THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**
Sitting alone

BETWEEN:

Mr D Read

Claimant

and

Balfour Beatty Group Employment Ltd

Respondent

ON: **30 & 31 January 2017**
7 February 2017 in chambers

Appearances:
For the Claimant: **Miss F Lawson, Counsel**
For the Respondent: **Mr D Maxwell, Counsel**

JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant contributed to that dismissal by his own blameworthy conduct. His compensation shall be reduced by 40% accordingly.

3. The matter is listed for a remedy hearing on **19 June 2017**.

REASONS

1. In this matter the claimant complains that he was unfairly dismissed. His previous claims of unpaid wages, holiday pay and notice pay have all been resolved and are dismissed on withdrawal.

Evidence & Submissions

2. I heard evidence for the respondent from:

    a. Mr G Saffery, retired Signalling Manager;
    b. Mr P Parr, Head of Programme Management Office; and
    c. Mr C Ottley, Project Director.

    I also heard evidence from the claimant.

3. An agreed bundle of documents was before me and both parties made full and useful submissions at the end of the Hearing.

Relevant Law

4. By section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

5. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

6. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.

7. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
    a. genuinely believed the claimant was guilty of misconduct;
    b. had reasonable grounds on which to sustain that belief; and
    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

    Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

8. The approach in Burchell is modified to the extent that even if the respondent fails to establish one or more of the three limbs above the Tribunal must still ask itself if the dismissal fell within the range of reasonable responses referred to below (Boys and Girls Welfare Society v Macdonald 1997 ICR 693).

9. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23).

10. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

11. In coming to these decisions, the Tribunal must not substitute their own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

12. If a dismissal follows earlier disciplinary warnings issued to a claimant and those warnings were taken into account by the respondent, the Tribunal's task remains to consider whether it was reasonable for the employer to treat the conduct, taken together with the earlier warning(s), as sufficient reason to dismiss. The Tribunal will not re-open and examine those earlier warnings unless it has cause to consider that they may have been issued in bad faith, for an oblique motive or were manifestly inappropriate (Davies v Sandwell MBC [2013] IRLR 374 CA).

13. Where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the basic award it shall reduce that award accordingly and/or finds that the dismissal was to any extent caused or contributed to by the action of the claimant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable. Compensation can also be reduced to take into account the likelihood that the claimant would have been dismissed in any event if a fair procedure had been followed (Polkey v AE Dayton Services Limited [1988] ICR 142).

Findings of Fact

14. Having assessed all the evidence, both oral and written, I find on the balance of probabilities the following to be the relevant facts.

15. The claimant commenced employment with the respondent, a large national employer, on 5 February 2001. By the time of his dismissal he was a site manager 2 working on the Network Rail Thameslink project. The claimant reported directly to Mr Ryan, works manager, who in turn reported to Mr Wright, project manager, who reported to the senior project

manager (previously Mr Major and from October 2015 Mr Duffy) who reported to Mr Ottley the overall project director.

16. The claimant says he was subject to an undated disciplinary policy headed Balfour Beatty Group Employment Ltd (Rail) whereas the respondent's witnesses believed he was subject to, and they applied, a policy headed Balfour Beatty Group Employment Ltd (UK). Miss Lawson argued there was a difference "in tone" between them but did not expand upon this in submissions. I find that there was no significant difference between the two policies in practice. Both policies state that there are alternatives to dismissal available in the respondent's discretion.

17. 2015 disciplinary process

18. The claimant was issued with a final written warning in September 2015 (unfortunately the warning itself was not dated) which was stated to remain on his record for 12 months. The background was that on two occasions in June of that year it was alleged that the claimant, whilst performing his duties as track back assessor (essentially performing the final review of work, certifying that it had been completed correctly and was safe), had failed to identify that a rail which should have been cut by disc had in fact been cut by flame thus posing a serious safety risk. This error had been discovered by two other employees when the side plate was removed. Disciplinary proceedings were commenced against the claimant and one other employee. An investigation was carried out during which the investigator interviewed the claimant, the other employee and four witnesses. A thorough report was produced which concluded that the claimant had a level of responsibility to complete works to standard and had not done so. Further, when non-compliance was brought to light no action had been immediately taken to identify responsibility for the non-compliance and there had been a delay to rectification works. The investigator concluded there was poor workmanship and a dangerous situation.

19. The claimant attended a disciplinary hearing on 17 September 2015 held by Mr Major. He was not accompanied at that hearing but he specifically confirmed that he was happy to proceed alone. He gave his detailed response to the disciplinary charges and after an adjournment Mr Major confirmed that he found the claimant guilty of misconduct and issued a final written warning. The claimant was informed that he had the right to appeal within seven days of the date of the hearing.

20. That outcome and right to appeal (again expressed to be within seven days of the date of the hearing) was put in writing and sent to the claimant by Ms Anderson of HR. That letter stated:

> "Any further repetition, failure to make the necessary improvements or any further breach of Company standards and rules may *(my emphasis)* result in further disciplinary action."

21. As already stated unfortunately that letter was undated and the respondent accepts that there was some delay in it being sent to the claimant. As a

result when the claimant received the letter the seven day period for an appeal had already passed. The claimant says that that being the case - although he had wished to appeal - when he received the letter and noted that he was outside the time limit for doing so, he did not nor ask whether he could appeal out of time.

22. I find that the claimant was informed of his right to appeal and had the opportunity to do so. If, as he says, he was not clear about that on the day of the hearing itself it was made clear to him in the letter. If at that point he had wished to appeal then I would have expected him at the very least to have contacted the respondent to request an appeal out of time relying upon the fact that the undated letter had been received by him outside of that time period. The fact that he did not do so leads me to conclude that he accepted, even if reluctantly, the outcome of the disciplinary process at that time.

23. 2016 disciplinary process

24. Mr Duffy joined the respondent and replaced Mr Major as the claimant's second line manager in October 2015.

25. On 21 October and 4 November Mr Duffy became aware of what he regarded as failures by the claimant to perform his duties satisfactorily. On 21 December he carried out a site visit together with Mr Wright and found incomplete works. His request that this be addressed was delegated to the claimant but no action was taken. On the same date Mr Everest, senior engineering manager – a peer of Mr Duffy and also a direct report to Mr Ottley - emailed the claimant cc'd to Mr Duffy and others highlighting items that he believed required attention on the same site following his site visit the previous day.

26. Mr Duffy was also concerned that his request for resources over the Christmas period to be locked down by 4pm on 16 December, which he understood was delegated to the claimant, was not completed until 24 December which had significant operational consequences.

27. Mr Everest again emailed the claimant and others on 31 December noting further items that needed to be completed and asking for them to be added to the snagging list.

28. On 6 January 2016 Mr Duffy emailed Mr Everest asking for a narrative of the conversations he had had with the claimant regarding Christmas resourcing and any requests he had made for works to be completed. Mr Everest replied in detail on 12 January.

29. Mr Duffy met with the claimant on 15 January and informed him that he was suspended from work until further notice while an investigation would be carried out into an allegation of gross misconduct by his failure to carry out his duties as a site manager from 21 October 2015. The suspension was confirmed in writing on the same day.

30. Mr Saffery was asked by HR to conduct the investigation into this allegation. He received details of the complaints by Mr Duffy and Mr Everest which he put into statement format that were signed by both gentlemen on 23 February. He also received copies of the emails referred to above.

31. Mr Saffery interviewed the claimant on 19 January during which the claimant was asked for his comments on the matters raised by Mr Duffy and Mr Everest. Specific points raised by the claimant during that meeting were that:
    a. he had not had a performance review;
    b. he had to spend a lot of time in the office doing paperwork;
    c. he would love to be on site more but there was too much paperwork to be completed in the office;
    d. he was working 72 hours plus each week, doing 13 hour days also working from home;
    e. in relation to the request to clear waste from the site that he was asked to put a plan in place and it had been cleared many times but he did not want "to be seen as Steptoe and son";
    f. he asked why the managers who were complaining had not come to see him about their concerns and that if anyone felt he was not doing his job correctly they should take him to one side and have a word;
    g. he shared the resourcing task with Steve Houlter and that Narinder (the labour manager,) was a busy lady and maybe she had not put the numbers down right;
    h. he received over 100 emails a day, could not remember getting specific emails but acknowledged that he probably should acknowledge emails more;
    i. when asked why he thought people were raising these issues he said that he thought someone has it in for him; and
    j. in response to the allegation that he was not working collaboratively, he said they should pull in anyone within Siemens, Network Rail and Civils and they would see that he gets on really well with everyone.

32. Mr Saffery also interviewed Mr Ryan on 19 January, during which he confirmed that he was aware there had been complaints from Network Rail about the claimant's site and that the claimant had been instructed to attend the site each day but had failed to do so but no formal action had been taken by Mr Ryan in that regard. He also confirmed that the claimant on one previous occasion had raised an issue regarding his workload and that he "always seemed to say that he had a lot to do in the office" but he (Mr Ryan) believed he did have time to attend site more often. Further that he was aware of some issues regarding the claimant but no complaints had been made and nothing was substantiated and that he felt the claimant had not responded effectively to the greater accountability and delivery needed on the various sites.

33. Mr Saffery separately received a written but unsigned statement from Mr Wright which was also broadly critical of the claimant's performance of his duties as well as commenting on specific allegations.

34. Mr Saffery conducted a further interview with the claimant on 29 January during which he discussed with him the information he had received from Mr Ryan and Mr Wright.

35. During this meeting the claimant specifically said in relation to the Christmas resourcing issue that he had given to Narinder all the necessary information, when he checked in her book all the manpower was covered and he had not realised by 23 December that she had not requested the manpower. When asked why he thought the necessary orders were not sent out the claimant said Mr Saffery needed to ask Narinder and Mr Ryan. He felt he did not need to check this because she was good at her job and if she had a problem she would have come back to him.

36. Towards the end of the meeting the claimant also said that he would like to be on site more and that he had had a conversation with Mr Wright where he said they needed more staff "on plans". Also that he would love to not sit behind a desk all the time and that there were not enough people to delegate to. He said that everyone was overworked and underpaid and that he had had a conversation with Mr Duffy on 23 December telling him that they needed one or two more site managers so that he, the claimant, could go out on site. He also expressed his disappointment that Mr Duffy had not spoken to him if he had a different way of doing things to Mr Major with whom the claimant had not had a problem.

37. Mr Saffery completed his investigation report on 9 March. He set out his findings in relation to each of 12 separate allegations between 21 October 2015 and 2/3 January 2016. He concluded that the case should proceed to formal action and that the claimant should face an allegation of:

> "Failure to follow direct instructions from a Senior Manager between 21st October 2015 and 31st December 2015 [and]
>
> Failure to carry out duties as a SM2 between 21st October 2015 and 31st December 2015"

and that this allegation was one of potential gross misconduct.

38. Mr Saffery also conducted an analysis of the claimant's email traffic in January and February 2016 (there was no information available for October to December 2015). This analysis took some time – it was completed on 9 April - as he did not get the necessary support from the IT department but it showed:
    a. 281 emails in the claimant's inbox in January 2016 and 280 in February 2016.
    b. 63 deleted emails in January 2016, 145 deleted emails from 1 to 21 February 2016.
    c. 73 emails sent in October 2015, 116 sent in November 2015 and 68 sent in December 2015.

39. He concluded that the average number of emails received in January 2016 and February 2016 was 96 per week, far short of the alleged 100 emails received per day alleged by the claimant. This approach was flawed in that it did not take into account that the claimant had been suspended on 15 January which undoubtedly would have had a significant impact on the amount of email traffic he received/sent.

40. The investigation report was submitted to HR who appears to have made the decision that the claimant should attend a disciplinary hearing, although I note that Mr Parr, who was appointed to conduct that process, described this to me as "a foregone conclusion". Mr Parr wrote to the claimant on 16 March informing him that he was required to attend a disciplinary hearing to consider allegations of misconduct (not gross misconduct) identified during Mr Saffery's investigation. The allegations set out were as stated in the investigation report. Enclosed with the letter were copies of the witness statements, investigation meeting notes, investigation report, email analysis and disciplinary policy and procedure. The claimant was advised of his right to be accompanied at the meeting and also that if the allegations were proved it could lead to dismissal with notice or some other appropriate sanction.

41. The disciplinary hearing took place on 21 March. The claimant was not accompanied. At the outset of the hearing Mr Parr explained that each allegation would be dealt with in turn but it was unlikely that a decision would be made on that day as there may be issues raised which he would need to look into. This led the claimant to expect that the hearing may well be resumed at a future date. Mr Parr accepted in his evidence that the claimant may well have thought that the hearing would be reconvened but he, Mr Parr, on advice from HR later felt this was unnecessary as he had as much as he was going to get.

42. Mr Parr then went through each of the allegations in detail with the claimant who had a full opportunity to comment on each of them.

43. In respect of allegation three, non-removal of waste, the claimant said that he was fed up with other companies not taking responsibility for the removal of their waste and that no one had approached him or made him aware prior to the hearing that they were not happy with him for failing to remove the waste and questioned why it was now being raised. He also referred to the fact that he had not had any performance review in over three years and found it odd that these incidents/allegations were now suddenly being levelled against him.

44. In respect of allegation four, the Christmas blockade resource, he repeated his statement from the investigation interview that the issue had been caused by Narinder's mistake and that he had not been aware the order had not gone out until 23 December and that it was not his responsibility to check with her.

45. In respect of allegation five, the request to test cut a drainage pipe, the claimant said that he did not carry out the test as requested as he needed

to wait for the pipe to come and he knew from past experience that he could cut the pipe with the correct saw.

46. At the conclusion of the meeting the claimant said that he was amazed that during all this time "no one had had the decency" to raise any of these issues with him and it seemed like "the knives were out".

47. Following the meeting Mr Parr asked for further information from both Mr Ryan and Mr Wright. Mr Wright's comments were detailed. Mr Parr's evidence was that he had also re-interviewed "pretty much all of the people" referred to in each of the 12 allegations and that he made notes of those discussions in his day book which he has now been unable to locate. Therefore there were no copies of this before me. He did not, however, interview Narinder on the resourcing issue and accepted at the Hearing that she should have been interviewed.

48. Mr Parr's evidence was that he also spoke to Mr Duffy on a number of issues during which Mr Duffy confirmed that if the issues could be resolved he would be willing to allow the claimant to be reintegrated into his team.

49. The results of all these further enquiries were not copied to the claimant for his comments as Mr Parr considered that no new information had come to light and there was no need for a resumed hearing with the claimant.

50. At the Hearing Mr Parr accepted that in relation to allegation five the claimant could well have been correct when he said that he did not need to do a test cut as requested and that in ordinary circumstances this would "go by the by". Notwithstanding that it is clear that this was a reasonable managerial instruction from Mr Wright that the claimant did not obey.

51. Mr Parr's conclusions in respect of each of the 12 allegations were as noted in manuscript by him on a copy of the investigation report. In respect of allegations 1, 2, 6, 7, & 10-12 he concluded that there was no case to answer.

52. In respect of allegations 3-5 and 8 & 9 he found they were proved and that each would warrant either a verbal or written warning. He accepted in his evidence that allegations 8 & 9 were effectively the same as issues 5 & 4 respectively.

53. His conclusion, in light of these findings, was that with a final written warning already on the claimant's record the appropriate penalty was dismissal. He confirmed this in a letter, based on an HR template, to the claimant dated 18 April 2016. In error that letter stated that the claimant was summarily dismissed with effect from 21 March 2016. Further it did not state which of the allegations had and had not been proved but simply referred to the broader allegations as set out in the original investigation report and disciplinary charge letter. The claimant was advised of his right of appeal.

54. The error in the letter of dismissal was later corrected and the claimant was told he would be dismissed on notice. When his notice was paid however he was paid the incorrect amount. Eventually that error, together with the other underpayments to the claimant, were also corrected.

55. It was very clear from Mr Parr's evidence that he, not unreasonably especially as he had not been trained on conducting disciplinary processes, took advice from HR about his decision. His understanding was that if a final written warning was in place and "something further was found" this "leads to dismissal". Miss Lawson specifically asked him if this was the case regardless of any wider circumstances and he replied "yes I believe so". Further she asked whether when someone has a final written warning and does something else that warrants a verbal warning, they have to be dismissed. Mr Parr replied "that's the policy – I don't write the rules – I follow the policy". In re-examination he repeated that position.

56. The claimant indicated on 26 April that he intended to appeal and set out in detail his grounds in an email dated 25 May. In the meantime he had been invited to attend an appeal hearing on 19 May with Mr Ottley.

57. The detailed appeal letter could not refer to the specific allegations that had been upheld against him as the claimant did not know what they were but it clearly did refer to:
    a. alleged unfairness of the final written warning and the letter being issued late so the appeal window had passed;
    b. his belief that that warning and the 2016 allegations were orchestrated to be used against him;
    c. the lack of PDRs or indication from his managers on how they wanted him to change;
    d. the failure of Mr Parr to resume the disciplinary hearing and the lack of opportunity to discuss how to rectify the situation or to improve on the issues that had been raised;
    e. that he had worked for Mr Major for 3 years with no issue then within 2 months of Mr Duffy taking over he had been suspended;
    f. he had not been offered any action plan or assistance to improve.

58. The appeal meeting was held on 2 June. The main focus was on the appropriateness or otherwise of the 2015 warning. This was in keeping with Mr Ottley's email to HR when he received the detailed appeal letter where he said that the claimant seemed to be basing his appeal around that warning. The claimant was asked if he had any issues in relation to his dismissal and, in addition to his point regarding the 2015 warning, he said that it appeared to be a witch hunt. The 5 specific allegations that had been found proved by Mr Parr were not addressed. Given that the claimant had not been told what they were this is not surprising.

59. The claimant was then told by letter from HR dated 14 June that an appeal against the 2015 warning would be considered as part of the review of his dismissal and that he should provide any further written statements he wished to by 16 June. Mr Ottley accepted in his evidence that in the circumstances that was not long enough. No further statements were

provided by the claimant but neither did he request any further time to do so.

60. Mr Ottley set out his conclusions on the appeal by letter dated 1 July. He had conducted a detailed review of the 2015 warning and concluded that it had been a fair sanction, reflective of and appropriate to the allegations and investigation findings. As far as the 2016 dismissal was concerned, the letter stated that the main point of the appeal was focussed on the 2015 warning and that this was the catalyst for the dismissal. Mr Ottley said that in his review he had not seen any evidence to suggest that that was correct. Whether he saw it or not, the evidence of Mr Parr at this Hearing as described above was very clear that the 2015 warning was the reason for the dismissal and that without it the claimant would have received a written or verbal warning. Mr Ottley concluded that the respondent had acted reasonably and the dismissal was reflective of the investigation and the live warning. Accordingly the appeal was not upheld

Conclusions

61. It is clear that the reason for the claimant's dismissal was conduct, specifically the five allegations found proved by Mr Parr (recognising that in reality they amount to three allegations).

62. I am satisfied that the respondent, through Mr Parr and Mr Ottley, had a genuine belief in the claimant's guilt of that conduct.

63. As to whether they had reasonable grounds for that belief, in respect of allegation three (non removal of scrap) this was a reasonable management instruction and the claimant confirmed to Mr Saffery that he was resistant to complying "a couple of times" (hence the "Steptoe & son" comment) albeit that he said had reasons for this – both the failure of other people to take responsibility and time pressure. On allegations 4 & 9 (Christmas resourcing), the claimant was consistent in his position that this was a responsibility he shared with Mr Houlter and that the correct instructions had been given to Narinder. In the absence of any investigation with either of those two people, I cannot find that the respondent had reasonable grounds for this belief. On allegations 5 & 8 (test cut of drainage pipe) Mr Wright's statement in the investigation was clear that he requested the claimant to trial the reciprocating saw and that the claimant agreed to this and told him that it would be done but it was not. The claimant did not disagree with this account but sought to justify why no test was required. Accordingly, the respondent had reasonable grounds for their belief in these allegations.

64. As to whether there was reasonable investigation, the specific factual context to allegations 3, 5 & 8 was properly investigated though wider issues raised by the claimant – such as the lack of PDRs or day to day feedback regarding dissatisfaction with his performance, the impact of a change of manager, his belief that there was a campaign against him, his working relationship with other contractors, workload and lack of resource – were not investigated at any stage and should have been. In addition it

follows from my conclusions above that I find there was inadequate investigation in respect of the allegations regarding Christmas resourcing. The failure to interview Narinder in particular but also Mr Houlter was a serious one and undermines the respondent's conclusions on that matter. Overall therefore the respondent failed to conduct a reasonable investigation.

65. There were also flaws in the procedure used by the respondent. This is particularly surprising given their size and resources and that the disciplinary team were being supported by an HR department. Mr Parr's decision letter should have set out clearly which of the 12 allegations had been upheld. This would have allowed the claimant to more fairly put his case at appeal stage and had the knock on effect that the appeal hearing did not properly address those specific issues. The claimant also reasonably thought that the disciplinary hearing would be reconvened and it was not. Mr Parr failed to keep notes of the investigatory interviews he conducted and the outcome of those interviews was not put to the claimant for comment. I am unable to assess how serious or otherwise that failing was as of course I do not know what was said as we do not have the notes. There was then the serious error, albeit later corrected (twice), in the dismissal letter regarding type and date of dismissal and notice pay. Very short timescales were then given to the claimant to respond to the request for further statements in the appeal. Also, with regard to the appeal it was unfortunate that it did not examine in any detail the specific findings of Mr Parr and the claimant's position on them (compounded as stated above by the failure to set those findings out in the dismissal letter) but I accept that Mr Ottley did give the claimant the opportunity to raise anything he wanted to.

66. Overall, however, and looking at the process in the round I do not find that these procedural flaws – although not insignificant – were serious enough to fall outside the band of reasonableness and undermine the fairness of the dismissal. They reflect, no doubt, the fact that none of the respondent's witnesses had been trained on conducting a disciplinary process.

67. Turning to whether the decision to dismiss was within the band of reasonable responses, and specifically reminding myself not to substitute my view, I deal first with the issue of the 2015 warning. I am satisfied that that warning was not issued in bad faith, for an oblique motive or was otherwise manifestly inappropriate. The process followed in 2015 was fair and Mr Ottley remedied any issue there was regarding the lack of appeal.

68. Even against the background of that warning, however, I conclude that the decision to dismiss was outside the band of reasonable responses. First, it is clear that Mr Parr regarded dismissal as in effect automatic because of the earlier warning. He gave no consideration to exercising any discretion to award an alternative penalty (as provided for in the disciplinary policy). Second he gave no effective consideration to other wider mitigation e.g. the claimant's length of service, workload (beyond the flawed review of emails), lack of PDRs/feedback. Third and very significantly he did not

give proper consideration to Mr Duffy's comment that he would reintegrate the claimant back into his team if the issues were resolved. None of these flaws were remedied by Mr Ottley on appeal – indeed he did not know about Mr Duffy's comment (though did say at the Hearing that it would have made no difference to him). If the respondent had properly considered all these matters dismissal would not reasonably have followed.

69. Accordingly I conclude that the dismissal was unfair due to a failure to investigate and dismissal being outside the band of reasonable responses.

70. I also find however that the claimant was guilty of blameworthy conduct in that his failure to obey reasonable management instructions both in respect of the removal of waste and the drainage pipe test cut contributed to his dismissal. I have considered whether to also take into account the claimant's conduct that led to the 2015 warning which clearly directly led to his later dismissal. On balance I do not as I am not satisfied that I have sufficient material before me to make a finding of fact as to the claimant's culpability on that occasion especially in light of his evidence as to the circumstances at the time with regard to his duties, workload and his ability to see the type of cut without removing the plate.

71. The basic and compensatory awards will therefore be reduced and I assess the level of reduction at 40%. Looking at the case in the round, it was more the respondent's failings that led to the unfairness of this dismissal than the claimant's conduct. I make no reduction to reflect the possibility that if the missing investigations had been carried out that would have made no difference to the outcome; to do so would be too speculative.

72. The matter will therefore proceed to a remedy hearing on 19 June. If either party requests any specific directions in respect of that hearing they shall write to the Tribunal. If the parties are able to resolve the matter in the meantime they shall inform the Tribunal at the earliest opportunity.

Employment Judge K Andrews
Date: 2 March 2017